Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal –State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan	)	CC Docket No. 92-237
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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Summary

1. Congress has not given the Commission the authority to adopt the Coalition's "per connection" proposal. Congress has declared unequivocally that "every . . . carrier . . . shall contribute," and the Supreme Court has already admonished the Commission that its "estimations of desirable policy cannot alter the meaning of the Communications Act."

There are other flaws in the "per connection" proposal. The Coalition claims that its proposal will stop the USF's "death spiral." But the Coalition's proposal cannot achieve what its proponents claim – generate the same level of subsidy dollars while everyone supposedly pays less than they do today. Increasing the cost of accessing the PSTN is bad public policy and threatens the very Universal Service policies that the USF program is designed to address. Finally, the "per connection" proposal is not competitively neutral.

2. The Commission should impose a "freeze" on total Universal Service outlays and commence a proceeding to reevaluate the sufficiency of all Universal Service programs. The Chairman has noted that "if there is going to be such a large and significant federal program as this, it must have some basis for fiscal discipline and restraint" and that the benefits of the 1996 Act can "never be fully realized if contributions to universal service programs become so large that they overtax carriers' ability to bring such benefits to consumers." Federal taxes and regulatory fees already exceed 10 percent, and continued, unexamined fee growth could push these federal assessments towards 15 percent. Customers must all pay a wide variety of state and local taxes and fees, including state Universal Service contributions, E911 surcharges, and state and local sales taxes. VoiceStream submits that it is unreasonable to ask wireless consumers to pay 20 percent or more in taxes and regulatory fees for their telecommunications services.

3. The CMRS "safe harbor" is equitable and nondiscriminatory. There is no evidence to suggest that on average, wireless customers have higher interstate usage levels compared to customers of fixed landline service. The Commission should also recognize that it must adopt a CMRS safe harbor even if it adopts a "per connection" proposal.

4. There is no basis in law or policy to exempt prepaid-only carriers from Universal Service contributions. The Commission cannot exempt prepaid-only carriers without also exempting the prepaid services offered by carriers that also provide post-billed services. But even a uniformly applied "prepaid exemption" would artificially distort market forces and consumer purchase decisions.

5. There is no basis to impose on the fiercely competitive CMRS industry new government regulations governing the recovery of USF contributions. The Chairman noted three years ago that "the record clearly lacks substantial evidence that there are problems that need correcting in the CMRS market." The CMRS market has only become more competitive since the Chairman made that observation.

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REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION

VoiceStream Wireless Corporation ("VoiceStream") submits this reply to the comments filed in this proceeding.

The comments submitted in response to the NPRM largely fell along predictable lines. The beneficiaries of the "per connection" methodology developed by AT&T and WorldCom – the largest interstate carriers and large corporate users of those services ("the Coalition") – support the proposal because they would contribute far less than they contribute today.[1] Organizations representing consumers and carriers providing local telecommunications services (both lo-

[1] The "Coalition for Sustainable Universal Service" includes the two largest interexchange carriers ("IXCs"), AT&T and WorldCom, and the Ad Hoc Telecommunications Users Committee, whose members include "some of the country's largest companies." The large corporate users' position is puzzling because the per-connection proposal would largely end up shifting costs to their wireless and local exchange bills. Coalition Comments at 3.

cal exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers), however, uniformly oppose the proposal because its adoption would be flatly inconsistent with the explicit commands of the Communications Act and would fail to address the meaningful reforms needed in the Universal Service Fund ("USF") program as a whole. VoiceStream urges the Commission to freeze USF disbursements pending a comprehensive review of the sufficiency of the USF program.

I. THE COALITION PROPOSAL IS INCOMPATIBLE WITH EXPLICIT STATUTORY DIRECTIVES AND INCONSISTENT WITH SOUND PUBLIC POLICY

A. Congress Has Not Given the Commission the Authority to Adopt the Coalition Proposal

Congress stated in the Universal Service statute that "[*e]very* telecommunications carrier that provides interstate telecommunications services *shall contribute*" to the USF.[2] The words Congress chose to use – "every . . . carrier . . . shall contribute" – are unequivocal. The Coalition nonetheless asserts that the "best interpretation" of this statute is for the Commission to substitute the phrase, "shall be subject to the same formula," for the statutory words, "shall contribute." According to the Coalition, the Commission should pretend that Congress meant the following when it said "every . . . carrier . . . shall contribute":

> "[E]very telecommunications carrier must be subject to the Commission's universal service contribution *formula*" – "*even if the formula would result in some carriers making no contribution*."[3]

The Commission does not have the discretion to adopt the Coalition proposal, even if it could be justified in sound public policy. The Supreme Court has stated that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give ef-

[2] 47 U.S.C. § 254(d)(emphasis added).

fect to the unambiguously expressed intent of Congress."[4] The Congressional command could not be more plain and unequivocal: "every . . . carrier . . . shall contribute." The Supreme Court has held that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command.[5] Because the statute says that every carrier "shall contribute," and not every carrier shall be subject to the same contribution "formula," the Commission simply lacks the legal authority to adopt the Coalition proposal.

The path the Coalition invites the Commission to take is the same one that the Commission took a decade ago at the urging of IXCs. The tariff statute provided that "[e]very common carrier . . . shall . . . file" tariffs.[6] The Commission nonetheless decided that "every" did not mean "every," and that certain IXCs could therefore be excused from filing tariffs. The appellate court vacated the Commission's order, reminding the Commission that the word, "shall . . .is the language of command."[7] The Commission reinstated its mandatory detariffing order notwithstanding this admonishment, forcing the Supreme Court to intervene, with the Court declaring that "the Commission's estimations of desirable policy cannot alter the meaning of the Federal Communications Act."[8] It should be settled by now that when Congress uses the word "every" in the Communications Act, it must be interpreted to mean "every."[9]

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[3] Coalition Comments at 84 and 87 (emphasis added).

[4] *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984).

[5] *See, e.g., Lexecon* v. *Milberg Weiss Bershead Hynes & Lerach,* 523 U.S. 26, 35 (1998)("The mandatory 'shall' . . . creates an obligation impervious to . . . discretion."); *United States* v. *Monsanto,* 491 U.S. 600, 607 (1989)(By "shall" in a statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory."); *Pierce* v. *Underwood,* 487 U.S. 552, 569-70 (1988)(Congress' use of "shall" in a housing subsidy statute constitutes "mandatory language.").

[6] 47 U.S.C. § 203(a).

[7] *MCI* v. *FCC,* 765 F.2d 1186, 1191 (D.C. Cir. 1985).

[8] *MCI* v. *AT&T,* 512 U.S. 218, 234 (1994).

[9] *Compare Universal Service Report to Congress,* 13 FCC Rcd 11501, 11564 ¶ 130 (1996)("We view the mandatory contribution requirement set forth in section 254(d) as absolute.").

The Coalition alternatively argues that their proposal can be justified under the Commission's *de minimis* authority, but this argument is groundless as well. Congress has made clear that the Commission's exemption authority is limited to the situation where the level of a carrier's interstate activities is "limited," such that "the administrative cost of collecting contributions . . . would exceed the contribution that the carrier would otherwise have to make."[10] The Commission has held that "the purpose of the *de minimis* exemption is to prevent waste resulting from requiring contributions when the administrative costs of collecting them will exceed the amounts collected."[11]

AT&T and WorldCom propose that they and other inter-exchange carriers (IXCs) be exempted not because their interstate activities are "limited" and not because the administrative costs of collecting contributions would exceed the amount of their contributions, but because, in the provision of most of their interstate services, they lease network access connections rather than own the network connections. The fact they lease rather than own their network connections clearly is not a basis for the exemption encompassed within the Commission's *de minimis* authority. Not only is the Coalition's argument incompatible with the plain language of the statute, but also adoption of the argument would give the Commission unbridled discretion to ignore the statutory command that every carrier shall contribute.[12]

Perhaps the most baseless argument the Coalition makes is its assertion that the "legal debate" over the interpretation of Section 254(d) is "not of any substantial practical importance,

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[10] 47 U.S.C. § 254(d); S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 131 (1996).

[11] *Universal Service Order,* 12 FCC Rcd 8776, 9187 ¶ 802 (1997).

[12] Under the Coalition's proposal, the Commission would presumably have authority to adopt a contributions "formula" whereby only CMRS carriers would be required to make USF contributions, with the Commission supposedly possessing the *de minimus* authority to exempt all non-CMRS carriers from making any contributions because of the specific "formula" it chose to adopt.

but a question of only marginal significance affecting only a small number of carriers."[13] According to the Commission's own data, IXCs funded 63 percent of all USF contributions made during the third quarter of 2001 – which is equitable because they generated 63 percent of all interstate telecommunications services revenues.[14] Had the Coalition proposal been in effect during the same period, the same IXCs would have contributed at best only 2 percent of total USF contributions (assuming that all competitive local exchange carriers ("CLECs") were owned by IXCs).[15] At issue, then, is what carriers will fund more than 60 percent of total USF contributions under the Coalition's proposal? The legal debate over Section 254(d) thus has enormous practical limitations.

The Coalition proposal is bad public policy, as VoiceStream will discuss below. In the end, however, this public policy debate is irrelevant, because the Commission does not possess the legal authority to adopt the proposal, even if it had merit. As the Supreme Court has already admonished, "the Commission's estimations of desirable policy cannot alter the meaning of the Federal Communications Act."[16]

B. Changing the USF Contributions Methodology Will Not, as the Coalition Suggests, Stop the USF "Death Spiral"

The Coalition contends that we face a "crisis" as a result of a "death spiral."[17] This "death spiral" is occurring, they say, because USF outlays continue to increase while the amount

[13] Coalition Comments at 83-84.

[14] *See USF Contributions FNPRM* at ¶ 59.

[15] During 3Q01, LECs contributed 23 percent of total USF contributions. *See id.* During 3Q01, CLECs generated 13 percent of total LEC revenues included in the USF base. *See* Industry Analysis Division *Telecommunications Industry Revenues 2000,* at 34, Table 14 (Jan. 2002).

[16] *MCI* v. *AT&T,* 512 U.S. 218, 234 (1994).

[17] *See* Coalition Comments at v.

of "*wireline* interstate telecommunications revenues have begun to shrink."[18] (The Coalition inexplicably ignores the increased interstate revenues generated by wireless and other carriers in defining the problem.) The Coalition readily acknowledges that one of the major reasons *wireline* interstate revenues are beginning to fall is because they are "work[ing] to avoid carrier assessments and end user universal service charges, by constructing contracts that allocate more revenue within a bundled offered to services other than interstate telecommunications."[19] The Coalition thus asks the Commission to radically change the way USF contributions are assessed (to their sizable benefit) based on a "crisis" and "death spiral" they themselves helped to create.

The Coalition asserts their "per connection" proposal would "stabilize the universal service contribution mechanism."[20] This assertion, however, is contradicted by its own comments. Its "per connection" proposal is designed to generate the same level of subsidy dollars generated by the current revenues-based methodology. The Coalition recognizes estimates that USF requirements will increase by 25 percent over the next five years.[21] Changing the contributions methodology will do nothing to stop this growth in Universal Service funding requirements. Indeed, the Coalition devotes most of its separate comments to arguing that, under its "per connection" approach, consumers and small businesses should help fund the inevitable increases needed

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[18] *Id.* (emphasis added).

[19] Coalition Comments at 38. *See also id.* 24 ("The reality, however, is that the Commission has no effective and nondiscriminatory way to police the manner in which the parties to a contract allocate revenues within a bundled contract (or set of contracts) for interstate and intrastate telecommunications services, information services, CPE, and other services. Users understandably seek the best total price. If getting that price means that more revenue is allocated to intrastate telecommunications services, information services and CPE, so that federal universal service charges can be minimized, that will be the outcome.").

[20] *See* Coalition Comments at 9.

[21] *See* Coalition Comments at 38 ("[T]he Administration's FY 2003 Budget predicts universal service funding increases from an estimated $5.8 billion in FY2002 to $7.2 billion in FY2006.").

to sustain additional growth in Universal Service funding requirements *after* its "per connection" proposal is adopted.[22]

Changing the way USF contributions are assessed may give the impression to some that the Commission is attacking the Universal Service funding "crisis," but the reality is that changing contribution methodologies to generate the same level of USF subsidy dollars does nothing to address the real problem – continued growth of the USF programs and the subsidy dollars needed to sustain that growth. As one consumer organization correctly notes, it "should be clear that no [contributions] methodology can provide stability unless there is stability in the size of the USF."[23] Unless the growth of Universal Service programs is rationalized, carriers and, therefore, consumers will pay more – regardless of the specific contribution methodology chosen.

C. The Coalition Proposal Cannot Achieve What its Proponents Claim

The Coalition contends that its "per connection" proposal would generate the same amount of USF contribution amounts raised today from the percentage of revenues methodology. Yet, it asserts that, under its proposal, "residential consumers as a whole, as well as low income consumers will actually be better off" – that is, pay less under the proposal than they pay today.[24] And, the Coalition continues, "[b]usiness users likewise will be better off . . . . Residential customers and business customers both win."[25] How can both residential customers and business

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[22] *See* Ad Hoc Telecommunications Users Committee Comments at 8-19. *See also* Coalition Comments at 64 (FCC "should not freeze universal service assessments for these connections at $1."); *id.* at 15 ("[I]f the Commission implemented the per-connection contribution mechanism and then six months later increased total USF such that anticipated collections would not be sufficient to cover anticipated expenditures, all assessment rates for all connection classes would be adjusted in equal proportion.").

[23] National Association of State Utility Consumer Advocates Comments at 9 ¶ 11.

[24] Coalition Comments at vi.

[25] *Id.* at vii.

customers pay less under the Coalition proposal, and yet its proposal generate the same level of contributions as the current system?

The Coalition submitted a lengthy declaration in an attempt to support the proposition that at "every level of household income, residential customers would pay less" under its proposal.[26] The conclusions drawn, however, were based on TNS Telecommunications Bill Harvesting Data.[27] But as consumer organizations note, this Harvesting Data is "not available to the public," which makes it impossible to assess the accuracy of the representations contained in the declaration.[28] It is doubtful whether, as a matter of law, the Commission can even consider the declaration because of its use of undisclosed, proprietary information.[29]

In contrast, a group of consumer organizations compared the "per connection" proposal with the current revenues-based approach against the calling plans of 13 different IXCs.[30] This analysis indicates that "both average-use and low-use residential customers utilizing any of the 13 calling plans of carriers studied would pay more per month under the Commission's proposed connection-based fee system than they do under the current revenue-based system."[31] The consumer organizations concluded on the basis of this publicly available data that:

> [T]he connection-based fee would result in shifting much of the responsibility for funding USF obligation from the largest users of interstate telecommunications services, which are usually business customers, to low-volume residential customers who are also often low-income customers as well.[32]

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[26] *See* Coalition Comments, Attachment 2, at 2 ¶ 4(a).

[27] *See id.* at 2 ¶ 2.

[28] Consumers Union *et al.* Comments at 6.

[29] *See, e.g., Engine Mfrs. Ass'n* v. *EPA,* 20 F.3d 1177, 1181 (D.C. Cir. 1994)("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."); *American Medical Ass'n* v. *Reno,* 57 F.3d 1129, 1132 (D.C. Cir. 1995).

[30] *See* Consumers Union *et al.* Comments at 9-12 and Attachment 1.

[31] *Id.* at 11.

[32] *Id.* at 12.

In summary, at least based on publicly available data, the Coalition proposal would result in most consumers paying more for services than they do today. Such a conclusion is consistent with common sense. If large corporations will pay less and if total contribution amounts will remain the same, it necessarily follows that consumers and small businesses must pay more.

D. Increasing the Cost of Accessing the PSTN Is Bad Public Policy and Incompatible With the Very Purposes of Universal Service

The common purpose of the various Universal Service programs is to increase accessibility to our nation's valuable telecommunications infrastructure – whether it is people living in high cost areas, the poor, students in a classroom, or visitors to public libraries. Today, needed subsidy dollars are generated by usage – the more use one makes of telecommunications services, the more one pays in Universal Service contributions. As one state commission correctly notes, "all callers benefit from the universal service fund, but the callers who use the network the most (in addition to the recipients of the universal service fund) benefit the most":

> A usage-based approach assesses users' contributions in direct proportion to how much they use the network. Individuals who benefit more from the network should bear more of the burden of contributing to universal service.[33]

The IXC complaint – that the current revenue-based approach is "discriminatory and inequitable" when they pay a set percentage of total USF contributions because they generate a set percentage of total interstate revenues[34] – is truly baffling.

The Coalition proposal would assess contributions based on connections to the network. Under this proposal, a person with no interstate use in a given month would pay the same amount as a person generating 1,000 minutes during the month. The Coalition thus proposes to assess fees to access the public switched telephone network ("PSTN"), thereby making it more expen-

[33] California Public Utilities Commission Comments at 6.

sive for consumers and small businesses to obtain access to the PSTN. As one consumer organization accurately notes, the "per connection" proposal is more accurately termed an "access-based mechanism " because it would increase costs for accessing telecommunications services for consumers and small businesses.[35]

The Commission should not entertain a proposal to make telecommunications access more costly as a means to fund a program designed to make such access easier and more affordable. As one commenter notes, increasing the cost of access to raise Universal Service subsidy dollars could actually have the perverse effect of leading more lower income consumers to discontinue their telecommunications services – undermining the very purpose of Universal Service.[36]

E. The Coalition Proposal Is Not Competitively Neutral

The Coalition asserts that its "per connection" proposal "is competitively neutral because it does not distinguish between particular categories of service providers or the technologies they use in providing service."

> [C]arriers providing the same service (*e.g.,* interstate long distance) over different technologies (*e.g.,* wireline and wireless) are not subjected to different universal service assessments, as they are under the current system.[37]

VoiceStream disagrees with this assertion.

The plain language of the Universal Service statute mandates that the Commission "shall" base its Universal Service policies by furthering the principles listed in Section 254(b), including the principle that "all" carriers "make equitable and nondiscriminatory contribution to

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[34] *See* Coalition Comments at 28.

[35] *See* National Association of State Utility Consumer Advocates Comments at 10 ¶ 13.

[36] *See* Consumers Union *et al.* Comments at 12.

[37] Coalition Comments at 42-43.

the preservation and advancement of universal service."[38] Appellate courts have held that in implementing these statutory principles and in formulating its own Universal Service programs, the Commission must consider the state universal programs.[39]

The Coalition acknowledges that IXCs and CMRS providers compete with each other in the provision of toll services. Yet, its "per connection" proposal would not treat IXCs and CMRS carriers equitably, as VoiceStream pointed out in its comments:[40]

	Federal USF Contributions (Per Connection)	State USF Contributions (Percentage of Revenues)
IXCs	0	27% of Revenues[41]
CMRS	$1.00	85% of Revenues

The Coalition has stated that discrimination "will occur if two carriers offer competing services. . . , but the assessment is placed on only one of the carriers or is higher for one of the carriers, because then one carrier has a cost imposed on it that the other carrier does not."[42] Yet, this inequitable and competition-distorting result is precisely the result that would occur by adoption of the Coalition proposal – when total (intrastate and interstate) Universal Service burdens are considered. Under no circumstances can the Coalition proposal be considered competitively neutral and nondiscriminatory.

[38] 47 U.S.C. § 254(b)(4).

[39] *See Qwest* v. *FCC,* 258 F.3d 1191, 1199, 1201-04 (10th Cir. 2001).

[40] *See* VoiceStream Comments at 13.

[41] According to the most current data available, in 1999 and again during the first half of 2000, 27 percent of IXC end-user revenues were intrastate while 73 percent of their end user revenues were interstate. *See Monitoring Report,* Table 1.1 (Oct. 2001).

II. THE COMMISSION SHOULD IMPOSE A "FREEZE" ON TOTAL UNIVERSAL SERVICE OUTLAYS AND COMMENCE A PROCEEDING TO REEVALUATE THE SUFFICIENCY OF ALL UNIVERSAL SERVICE PROGRAMS

There is a crisis looming over the USF program, but the crisis is not caused by the contributions methodology in place today. The crisis is rather due to the fact that the size of Universal Service subsidy outlays has been allowed to grow – with additional growth in disbursements already planned – without a thorough examination of the sufficiency of the program.[43] Carriers (and, therefore, their customers) already pay a Universal Service tax of over 7 percent of total interstate revenues (in addition to other taxes and fees such as the excise tax, 911 surcharges, state Universal Service fees, and state and local sales taxes), and the amount of the federal Universal Service tax will necessarily increase if the Universal Service program continues its unrestrained growth. Changing the contributions methodology will do nothing to help consumers if the size of the Universal Service program continues to grow unexamined. The Commission has never addressed in the six years since the Universal Service statute was enacted the two most important questions pertaining to Universal Service:

1. How large can the Universal Service tax on consumers be before the tax itself begins to threaten the USF (*e.g.,* people stop buying telecommunications services because the tax makes the cost too prohibitive); and
2. What are the total subsidy outlays actually needed to sustain the USF?

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[42] Coalition Comments at 42.

[43] Coalition Comments at 18-19 ("Under existing Commission orders alone, it is certain that total universal service funding will continue to increase. . . . Moreover, both the Commission and Congress are considering additional changes that could increase the federal universal service fund.").

As Chairman Powell has stated, "if there is going to be such a large and significant federal program as this, it must have some basis for fiscal discipline and restraint, some basis for picking the 'right' funding level."[44]

Continued, unexamined growth in subsidy outlays – and, therefore, contribution levels – is no longer viable. Accordingly, VoiceStream respectfully requests that the Commission impose immediately a freeze on the amount of total USF subsidy outlays until the Commission has an opportunity to consider these fundamental questions.

VoiceStream is firmly committed to Universal Service and to funding its fair share of Universal Service programs – even though it does not receive any subsidy dollars in the provision of its mobile services. In this instance, VoiceStream speaks on behalf of its over 7.5 million customers and the millions of additional Americans who desire to subscribe to wireless services, but who may be inhibited in doing so because the accretion of government taxes and fees have simply become too large for them to afford to subscribe. As the Chairman has advised Congress, continued increases in Universal Service and other government fees "will unduly distort competition and add to the cost of service, which will likely result in higher rates to consumers."[45]

It is time, finally, that the Commission decide how much money the Nation can afford to allocate for preserving and advancing the USF. Equally important, it is time for the Commission to determine whether current subsidy outlays are truly needed or whether the size and scope of the programs must be more precisely defined. The Chairman has noted the Universal Service

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[44] Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, *Twelfth Order on Reconsideration and Fifth Report and Order, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 1 (May 27, 1999).

[45] Separate Statement of Commissioner Michael K. Powell, Concurring, Report to Congress, *Federal-State Joint Board on Universal Service*, at 5 (April 10, 1998).

funding and outlay levels "should be subject to a constant and searching scrutiny,"[46] and has recommended that the Commission establish an "early warning system," whereby "we regularly assess whether the funds and the pool of available contributions are sufficient to satisfy statutory requirements."[47] Yet, the Commission has never once addressed these fundamental questions in the six years since the enactment of the Universal Service statute.

A. The Commission Should Determine the Total Amount Industry (i.e., Consumers) Can Afford to Contribute to Universal Service

Congress has established the principle that "[q]uality services should be available at just, reasonable, and affordable rates."[48] In this regard, courts have held that excessive Universal Service funding "can itself violate . . . the Act":

> Because universal service is funded by a general pool subsidized by all telecommunications providers – and thus indirectly by the customers – excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.[49]

In short, at some point, excessive levels of Universal Service fees themselves threaten Universal Service.

Chairman Powell has noted that the benefits of the pro-competitive, deregulatory framework Congress sought to achieve by the adoption of the 1996 Act can "never be fully realized if contributions to universal service programs become so large that they overtax carriers' ability to

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[46] Separate Statement of Commissioner Michael K. Powell, *Fourth Order on Reconsideration, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 1 (Dec. 30, 1997).

[47] Separate Statement of Commissioner Michael K. Powell, Concurring, Report to Congress, *Federal-State Joint Board on Universal Service*, at 6 (April 10, 1998).

[48] 47 U.S.C. § 254(b)(1). It has further determined that carrier contributions to universal service programs should be "equitable." *Id.* at § 254(b)(4).

[49] *Alenco Communications* v. *FCC,* 201 F.3d 608, 620 (5th Cir. 2000). *See also Qwest* v. *FCC,* 258 F.3d 1191, 1200 (10th Cir. 2001).

bring such benefits to consumers."[50] As importantly, continued, unexamined growth in Universal Service disbursements threatens the very viability of competition and our nation's economy. As the Chairman has again stated:

> I believe we must diligently police the growth of universal service programs, lest such growth imperil carriers' efforts to bring the benefits of competition and innovation to consumers. In particular, we must limit carriers' contributions to universal service to the amounts absolutely necessary to fulfill the universal service statutory mandate. If subsidy programs get out of hand, they can dramatically raise competitors' costs and skew the economic incentives to enter markets.[51]

The very ability of carriers to provide quality services at just, reasonable and affordable rates is now in jeopardy. The current USF contribution factor is 7.3 percent.[52] According to the Administration, total USF disbursements could increase by 25 percent in the next few years.[53] Depending on future levels of interstate revenues, the federal USF contribution factor could reach (or exceed) 10 percent.

The Commission cannot, moreover, consider the Universal Service fees in isolation, because customers are impacted by total taxes and regulatory fees. There is the federal excise tax of 3 percent, plus additional Commission-mandated fees for the telecommunications relay service ("TRS"), local number portability ("LNP") and telephone number administration. Federal taxes and regulatory fees already exceed 10 percent. If there is continued growth in USF disbursements requiring an even larger USF contribution factor, total federal taxes and fees could approach 15 percent. Consumers must also pay a wide variety of state and local taxes and fees, including state USF contributions, 911 surcharges, and state and local sales taxes.

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[50] Separate Statement of Commissioner Michael K. Powell, *Third Order on Reconsideration, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 1 (Dec. 16, 1997).

[51] Separate Statement of Commissioner Michael K. Powell., *Fourth Order on Reconsideration, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 1 (Dec. 30, 1997).

[52] *See Public Notice,* Proposed Second Quarter 2002 Universal Service Contribution Factor, DA 02-562 (March 8, 2002).

VoiceStream submits that it is unreasonable to ask consumers to pay 20 percent or more in taxes and regulatory fees for their telecommunications services. VoiceStream appreciates that the Commission has no control over the federal excise tax and state/local tax and regulatory fee programs. But the Commission does have control over the size of its regulatory fees, and the Universal Service fee is by far the largest of all these fees.

VoiceStream therefore requests that the Commission commence a proceeding to determine the maximum sum carriers (actually, their subscribers) should pay for tax and regulatory fee programs generally and for the USF in particular. Under no circumstances should the Universal Service fees reach a level whereby they inhibit the ability of significant numbers of customers to retain and use the telecommunications services they want and desire.

B. The Commission Should Evaluate Whether Current Subsidy Outlays Are Truly Needed

The Commission also needs to reexamine the size and scope of its various Universal Service programs. As the Chairman has noted, it is difficult for government regulators to distinguish between "need as opposed to just want":

> It is unremarkable that demand [for Universal Service dollars] is high. Like in the movie "Field of Dreams," if you build it, they will come. And, as one would expect, we built a large federal program and they have come.[54]

Congress has charged the Commission with the responsibility to ensure that USF support mechanisms are "specific, predictable, and sufficient."[55] As the Chairman as observed, "'sufficiency' under the statute is in essence a question of balance: our universal service funds must be

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[53] *See* note 21, *supra.*

[54] Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, *Twelfth Order on Reconsideration and Fifth Report and Order, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 1 (May 27, 1999).

[55] 47 U.S.C. § 254(b)(5).

sufficient to preserve and advance universal service, but these funds must not become larger than is necessary to achieve these goals."[56] Each of the Commission's USF programs merit reexamination.

1. The High Cost Fund Program Needs to be Reevaluated. One of the primary purposes of USF support is to allow carriers to provide certain basic services to customers in high-cost areas without having to charge these customers unaffordable rates. However, rather than focus on what carriers in high cost areas need to provide affordable service, which requires determinations regarding affordability and the cost of service, the Commission has instead begun to transfer sizable sums to the USF program based on estimates of Universal Service subsidies supposedly built into current rates.

For example, the Commission decided two years ago in its *CALLS Order* to transfer $650 million to the USF program as part of its access charge reform proceeding.[57] The Commission made this transfer not because it determined that the subject LECs needed an additional $650 million in USF support, but because it found this sum was "a reasonable estimate of the amount of universal service support that currently is in our interstate access charge regime."[58] The courts, however, held that the Commission acted arbitrarily and capriciously in adding $650 million to the USF fund:

> The FCC does not explain how it actually derived that figure, and instead seems to invoke the Goldilocks approach to rulemaking: noting that "some commentators argues that the size of the interstate access universal service mechanism is too large [while] other commentators argue that the size . . . is too small.[59]

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[56] Separate Statement of Commissioner Michael K. Powell, Concurring, Report to Congress, *Federal-State Joint Board on Universal Service*, at 5 (April 10, 1998).

[57] *See CALLS Order,* 15 FCC Rcd 12962 (2000).

[58] *Id.* at 13046 ¶ 202.

[59] *Texas Office of Public Utility Counsel* v. *FCC,* 265 F.3d 313, 328 (5th Cir. 2001).

The Commission appeared to adopt a similar approach with the MAG Plan for rural ILECs, adding to the USF based not on actual need, but rather because of estimates of loss of implicit subsidies allegedly included in existing access charge prices.[60] Courts have overturned some of the Commission's Universal Service orders because they added obligations to the fund without examining the questions of affordability and the cost of providing covered services.[61]

There is also a need for the Commission to reexamine the scope of the high cost fund programs. For example, it is not apparent why services to businesses in rural areas are subsidized, since the subsidy is effectively paid by consumers in rural areas. Nextel recommends eliminating USF subsidies for second and third residential lines.[62] It also is not apparent why certain incumbent LECs should be able to use subsidy dollars for corporate operations expense, such as management salaries and the retention of consultants. But even if these practices could be defended in sound public policy, we may have reached the point where as a Nation we can no longer afford such luxuries.

2. The Schools and Library Program Needs to be Reevaluated. The Chairman has noted that the schools and library program "may be poised to overcollect" and "appears to be out of balance."[63] The telecommunications industry has funded billions of dollars of new equipment and discounted services for schools and libraries. VoiceStream has no doubt that this investment has been helpful. But can the Commission say with confidence that all of this investment was necessary or efficiently distributed? As the Chairman has noted, more modest funding would "not stop the program":

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[60] *See MAG Order,* 16 FCC Rcd 19613 (2002).

[61] *See, e.g., Texas Office of Public Utility Counsel* v. *FCC,* 265 F.3d 313 (5th Cir. 2001); *Qwest* v. *FCC,* 258 F.3d 1191 (10th Cir. 2001).

[62] *See* Nextel Comments at 31.

> [I]t would not jeopardize the well-being of our children. It would not condemn us to a world of haves and have nots. Modest funding would merely mean that all of the benefits of the program will not arrive immediately.[64]

It is also time for the Commission to begin assessing the success of the schools and library program and to build accountability into the program. As President Bush stated only last week:

> But my attitude is, if you spend something, you ought to get results for it. We ought to know. And that's what we insist . . . [that] in return for federal help, you've got to measure.[65]

The telecommunications industry has invested billions in our nation's schools and libraries. It is time that the Commission determine what our nation has received for that sizeable investment. Funding levels would obviously need to be reexamined if schools and libraries are unable to document tangible benefits from the significant USF funds they have received. Are there more fiscally sound and efficient governmental programs to address this educational goal?

C. The Commission Should Impose a Freeze on Total Subsidy Disbursements Until It Completes Its Reevaluation of Its Universal Service Programs

Continued, unexamined growth in USF subsidies is not sustainable. The Commission needs to determine the total sum our Nation can afford for Universal Service, so that USF contributions do not themselves threaten Universal Service. The Commission needs to reevaluate whether USF subsidy dollars are being spent for real needs or for recipient wish lists. This review will take time, and VoiceStream therefore urges the Commission to impose immediately a cap on disbursements during the pendency of this review. The cap could be imposed either on

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[63] Separate Statement of Commissioner Michael K. Powell, Concurring, Report to Congress, *Federal-State Joint Board on Universal Service*, at 5 and 6 (April 10, 1998).

[64] Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, *Twelfth Order on Reconsideration and Fifth Report and Order, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, at 2 (May 27, 1999).

each Universal Service program or on the total amount spent on Universal Service programs as a whole. VoiceStream favors the latter approach so the Commission has more flexibility to move funds from one program to another based on unanticipated demonstrations of need in a particular program.

The Commission has used caps in the past with success and, importantly, courts have affirmed the lawfulness of such caps. As the Fifth Circuit has held, caps on expenditures "reflect a reasonable balance between the Commission's mandate to ensure sufficient support for universal service and the need to combat wasteful spending":

> The agency's broad discretion to provide sufficient universal service funding includes the decision to impose cost controls to avoid excessive expenditures that will detract from universal service.[66]

III. THE CMRS "SAFE HARBOR" IS EQUITABLE AND NONDISCRIMINATORY

The Coalition asserts that the CMRS safe harbor "creates a systematic discrimination in favor of wireless-based services":

> [T]he existing wireless safe harbor significantly understates the amount of interstate revenues earned by wireless telecommunications providers, thereby unfairly shifting the burden of funding the universal system to wireline carriers.[67]

If this assertion were accurate (and it is not), it would at most mean that CMRS carriers are paying too much in contributions to state Universal Service and other state revenue-based fee/tax programs (because telecommunications revenues not reported as interstate are necessarily reported as intrastate).

The only evidence that the Coalition presents in support of their allegation is that the growth in CMRS interstate revenues has not matched the decrease in IXC interstate revenues.[68]

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[65] President Bush's Remarks before the Vandenberg Elementary School, Southfield Michigan (May 6, 2002).

[66] *Alenco Communications* v. *FCC,* 201 F.2d 608, 620-21 (5th Cir. 2000).

According to the Coalition, due to "wireless migration," every one-dollar decrease in IXC interstate revenue *should* result in a one-dollar increase in CMRS interstate revenue. This Coalition's argument – wireless migration is the sole reason that IXCs are losing revenues – is simply not credible. The Coalition ignores technological bypasses of their networks and the economic downturn.

Wireless migration is, of course, *a* partial reason that IXCs are losing revenues, but it is certainly not the *sole* cause. IXCs are also losing revenues because increased competition (including from the RBOCs) is forcing them to charge less per minute for their services. IXCs are also losing sizable revenues to "e-mail migration." People today often share information over e-mail rather than making a phone call. Use of facsimile transmissions alone has dropped considerably in recent years, as people undeniably find it more convenient and cost effective to attach a document to an e-mail message rather than to print the document and then pay per minute toll charges in faxing it. Internet telephony and expanded private networks have also diverted traffic that traditionally traversed the IXCs' networks.

The Coalition next asserts that the 15 percent CMRS safe harbor percentage is "arbitrary" and has no "rational basis."[69] This argument is baseless. The Coalition itself acknowledges that CMRS carriers do not have the ability to determine readily the precise amount of revenue attributable to interstate traffic as opposed to intrastate traffic and that as a result the Commission must adopt a proxy, or surrogate, for the CMRS industry.[70] The Coalition further notes that the

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[67] Coalition Comments at 31.

[68] *See* Coalition Comments at 33-34 ("While reported wireless interstate end user telecommunications revenues appear to have grown by approximately $4 billion since 1999, toll carriers reported interstate end user telecommunications revenues dropped by over $8 billion during the same period.").

[69] Coalition Comments at 78.

[70] *See id.* at 31-32. US Cellular ("USCC") states that it would "accept elimination" of the safe harbor because it apparently can segregate with reasonable accuracy its revenues by jurisdiction. USCC Comments at 9-10. The fact one regional carrier claims it can segregate traffic by jurisdiction, of course, does not mean that other carriers are

Commission based its 15 percent CMRS safe harbor percentage on the then reported percentage of interstate landline minutes of use.[71] Use of landline interstate usage as a proxy for wireless interstate usage is not only reasonable, but it also helps ensure that contribution obligations are equitable between different providers of local telecommunications services.[72]

The Coalition next asserts that it is no longer appropriate to base CMRS interstate usage on landline interstate usage.[73] However, the Coalition presents no evidence that consumers "disproportionately use their wireless phone for interstate calls." A minority of wireless customers do subscribe to "one-rate plans,"[74] but one cannot automatically conclude even with these customers that more than 15 percent of their mobile usage, on average, is interstate usage.[75] As AT&T Wireless has advised the Commission, one-rate plans have "not radically changed calling patterns":

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capable of doing so. Importantly, the Commission has injected sufficient flexibility into its safe harbor procedure so USCC can address any problem it may have with the current allocator. Specifically, if USCC believes that the 15 percent allocator does not accurately reflect the percent of interstate usage over its network, it is free to prepare and submit a special traffic study.

[71] *See* Coalition Comments at 32.

[72] The Coalition asserts that the safe harbor is discriminatory because CMRS contributions are based "solely on interstate usage" while LEC contributions are based on the Subscriber Line Charge ("SLC"). *See id.* at 32-33. This difference merely reflects a difference in technology. Much of a LEC's cost of service is related to loop plant, which is not traffic sensitive ("NTS"), and the Commission has determined that NTS costs should be recovered using fixed rather than usage sensitive prices. CMRS carriers, in contrast, have very little NTS plant in their networks, so there is no reason to use the LEC pricing structure. *See generally* Commission Letter to Sprint PCS, 16 FCC Rcd 9597 (May 9, 2001). It is not, therefore, "inequitable and discriminatory" (Coalition Comments at 33) for LECs to recover NTS costs using fixed prices and CMRS carriers to recover traffic sensitive costs using usage-based prices.

[73] *See* Coalition Comments at 32 ("Those [landline] percentages do not reflect the extent to which wireless consumers disproportionately use their wireless phone for interstate calls.").

[74] *See* VoiceStream Comments at 7 n.15.

[75] The Coalition compares the USF contributions of a hypothetical customer who moves her 100 minutes of interstate usage from Verizon to Verizon Wireless, claiming that Verizon Wireless would pay 80 percent less in USF contributions than Verizon. *See* Coalition Comments at 32. There are over 130 million CMRS customers, so it is possible that a handful of customers might use their handset solely to make and receive interstate calls. There are also millions of mobile customers who rarely use their handset to make interstate calls. Pointing at the two extremes is not helpful, especially since customer behavior can change over time. The relevant question, rather, is the percentage of interstate usage among *all* mobile customers.

> In fact, the large buckets of minutes contained in these plans appear to have increased overall wireless usage, with the rate of interstate calls rising only slightly faster than the rate of intrastate calls.[76]

When one considers that most wireless customers subscribe to a traditional mobile plan – they pay airtime charges plus toll charges in making a toll call – VoiceStream submits that the 15 percent interstate allocator is more than reasonable, especially when the landline interstate allocator has fallen from 15 percent to 13 percent.[77] It further bears noting that in adopting the 15 percent safe harbor allocator some years ago, the Commission acknowledged that this was "a conservative approach" given the record evidence suggesting at the time that the average wireless customer had less interstate usage than the average landline customer.[78]

As VoiceStream pointed out in its comments, the Commission would be required to establish a CMRS safe harbor even if it adopted the Coalition's "per connection" proposal for all federal fee programs.[79] Based on all available evidence, VoiceStream submits that a 15 percent safe harbor is a reasonable proxy for the CMRS industry. If the Commission has concern that any percentage it adopts could become "out of date,"[80] it could adjust the CMRS allocator annually as new LEC Dial Equipment Minutes ("DEM") data becomes available.

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[76] AT&T Wireless Comments at 6.

[77] *See* VoiceStream Comments at 7.

[78] *See CMRS Safe Harbor Order,* 13 FCC Rcd 12252, 21259 ¶ 14 (1998). *See also* Verizon Wireless Comments at 17 ("Prior to its adoption, many CMRS providers argued that the interstate safe harbor percentage for CMRS should be below 10%.").

[79] *See* VoiceStream Comments at 20-22.

[80] *See* Coalition Comments at 78.

IV. THERE IS NO BASIS TO EXEMPT PREPAID CARRIERS FROM UNIVERSAL SERVICE CONTRIBUTIONS

VoiceStream noted in its comments the considerable difficulties that arise in attempting to apply a "per connection" methodology to prepaid service.[81] Prepaid customers comprised 11 percent of all wireless customers at the end of 2000,[82] and prepaid service is a growing part of the business. Prepaid service is especially attractive to people with lower income, those with poor credit histories, or those who do not anticipate making a significant number of calls.

The Coalition recognizes that its "per connection" proposal would be "difficult to apply" to wireless prepaid service.[83] Their "solution" is a non-solution: "The Coalition is willing to work with the wireless industry to develop appropriate conventions to ensure that prepaid services are not advantaged or disadvantaged with respect to wireless subscription services."[84]

Certain carriers that provide only prepaid service use the difficulties in applying a "per connection" approach to prepaid service as a basis to argue that they should be exempt from making any contribution to Universal Service.[85] The Commission cannot adopt this proposal as a matter of law. As discussed above, Congress has commanded that "[e]very telecommunications carrier . . . shall contribute."[86] Besides, the Commission cannot, without distorting competitive market forces, grant an exemption to exclusive providers of prepaid service without granting the same exemption to all providers of prepaid service, including VoiceStream and

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[81] *See* VoiceStream Comments at 19-20.

[82] *See Sixth CMRS Competition Report,* 16 FCC Rcd 13350, 12281 (2001).

[83] Coalition Comments at 54.

[84] *Id.* at 54. VoiceStream finds significant that, in its comments, the Coalition has virtually abandoned its initial claim that the "per connection" proposal would result in significant administrative savings. In fact, the Coalition proposal would increase administrative costs. *See* VoiceStream Comments at 18-20.

[85] ePHONE Telecom Comments. *See also* Virgin Mobile Comments at 14 (arguing that providers of mobile prepaid service should be exempted if the Commission exempts wireline providers of prepaid service).

[86] 47 U.S.C. § 254(d).

other licensees that provide both prepaid and post-billed services. But even such a "nondiscriminatory" exemption would still distort the free operation of market forces because, by exempting all prepaid services, the Commission would artificially distort consumer decisions in determining whether to purchase prepaid service or post-billed service.

The prepaid example highlights one of the major flaws with the Coalition proposal: whatever initial attraction a "per connection" approach may have, the approach would be unworkable in practice and would have the real potential of distorting purchasing decisions and, therefore, market forces.

V. THERE IS NO BASIS TO IMPOSE ON THE COMPETITIVE CMRS INDUSTRY NEW REGULATIONS GOVERNING THE RECOVERY OF USF CONTRIBUTIONS

The California Commission believes that carriers should be required to identify any line item charge for federal Universal Service as the "Federal Universal Service Fee."[87] It further argues that "this requirement should be extended to CMRS" providers, although it does not recite any reasons for imposing new regulations on the CMRS industry.[88] VoiceStream is not opposed *per se* to use of the term, "Federal Universal Service Fee;" in fact, it currently uses in its monthly statements to customers the phrase, "Federal Universal Service Fund." VoiceStream does, however, strenuously object to the notion that the competitive CMRS industry is in need of new regulations – especially in the area of customer relations.

The Commission noted last year that there exists "a high level of competition for mobile telephony customers."[89] There are six national carriers in many markets. As VoiceStream noted in its comments, prices for mobile services have fallen by 30 percent over the past four years

[87] California Public Utilities Commission Comments at 14.

[88] *Id.*

[89] *Sixth CMRS Competition Report,* 16 FCC Rcd 13350, 12271 (2001).

(while prices for fixed telephone services increased by 13 percent).[90] Chairman Powell has recognized the "growing importance of wireless services in offering competitive choices for consumers."[91]

The Chairman has stated that the Commission should "only be imposing new regulations – however general or flexible – where necessary to correct well-supported, identifiable harms to consumers or 'just and reasonableness' problems."[92] The Chairman noted three years ago in the *Truth-in-Billing Order* that "the record clearly lacks substantial evidence that there are problems that need correcting in the CMRS context."[93] Since then, competition in the CMRS market has only intensified, making even more unjustified the imposition of new government "truth-in-billing" regulations on CMRS providers.

Three years ago, the Commission commenced a Further Notice of Proposed Rulemaking in Docket No. 98-170, where it asked whether truth-in-billing rules applicable to landline carriers should be extended to the competitive CMRS industry.[94] The new regulations being discussed were not justified in May 1999. The same regulations certainly cannot be justified in May 2002, given the dramatic growth in wireless competition.

It is time for the Commission to close the *Truth-in-Billing* docket as it applies to the competitive CMRS industry. As the Chairman has correctly observed, "competition *empowers* consumers to leave their provider and find another if their current provider is not treating them fairly":

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[90] *See* VoiceStream Comments at 9 and nn. 22-23.

[91] Remarks of Chairman Michael K. Powell, Association for Local Telecommunications Services, at 6 (Nov. 30, 2001).

[92] Separate Statement of Chairman Michael K. Powell, *Truth-in-Billing Order,* 14 FCC Rcd 7562, 7566 (1999).

[93] *Id.,* 14 FCC Rcd at 7567.

[94] *See Truth-in-Billing Further NPRM,* 14 FCC Rcd 7492, 7545 (1999).

> It is axiomatic that one of the most important benefits of competition is that it gives consumers the ability to change providers to obtain the best rates, terms and conditions for their individual needs.[95]

The facts before the Commission confirm that wireless customers are exercising their rights. Specifically, it recently noted that during 2000 alone, "almost one in five wireless subscribers have switched carriers."[96] The fiercely competitive CMRS market is not a market where the government needs to intervene to "protect consumers." Mobile customers have shown that they are able to protect their interests.

VI. CONCLUSION

For the foregoing reasons, VoiceStream respectfully requests that the Commission reject a connection-based assessment approach, impose a freeze on total USF disbursements, and commence a new proceeding to consider meaningful USF reform. Consumers will continue to pay more – regardless of the assessment methodology utilized – so long as the USF programs continue to grow without a searching examination of their sufficiency.

Respectfully submitted,

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[95] Separate Statement of Chairman Michael K. Powell, *Truth-in-Billing Order,* 14 FCC Rcd at 7564 (emphasis in original).

[96] *Sixth CMRS Competition Report,* 16 FCC Rcd at 13373.